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No. 82-1710

In the Supreme Court of the United States

OCTOBER TERM, 1982

FOX RIDGE ASSOCIATES & CO.,
APPELLANT,

v.

BOARD OF ASSESSORS OF
THE TOWN OF MARSHFIELD,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

SECOND SUPPLEMENT TO JURISDICTIONAL STATEMENT

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Appellant acknowledges receipt of a copy of Appellee's Brief In Opposition to Petition for A Writ of Certiorari and notes that it is not responsive to the appeal in that it fails to satisfy the criteria of Rule 16 or the terms of the extension order dated May 13, 1983.

Subsequent to the filing and docketing of the appeal, the ATB has issued a decision, order and findings of fact, in a case

involving the fiscal 1981 real estate taxes. The same parties and properties are involved. The appellant is aggrieved by the decision, believing that the adjusted taxes are excessive by at least $50,000. Unlike the fiscal year 1980 case, both sides were represented at the hearing and presented testimony; a stenographic record of the proceedings was arranged for and provided.

The decision, order and findings of fact for the fiscal year 1981 case are reproduced as Appendix K and L respectively. Appellant has noted substantial inconsistencies between the evidence and the findings and between the findings for the two years; appropriate motions have been filed with a view toward correcting the same. If the Motions do not result in such corrections, then an appeal likely will be taken to the Massachusetts Supreme Judicial Court. Consequently, a notation of probable jurisdiction in the subject appeal will likely result in an opportunity to consider and deal not only with Appellant's explicit due process problems; but with the implicit due process problems raised by the Massachusetts Bar Association's Taxation Section (Appendix J).

In combination, Appellant's appeal and the concerns expressed in Appendix J, establish that a substantial federal question is involved.

Respectfully submitted,

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APPENDIX K

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD
LEVERETT SALTONSTALL BUILDING, GOVERNMENT CENTER
100 CAMBRIDGE STREET, BOSTON, MASS. 02202

DOCKET NO. 114551, 114552, 114553, 114554, 114555, 114556, 114557, 114558, 114559, 114560, 114561.

FOX RIDGE ASSOCIATES AND COMPANY,
APPELLANT.

BOARD OF ASSESSORS OF THE TOWN OF MARSHFIELD,
APPELLEE.

DECISION/ORDER

These cases were tried together. One value was established which represents the total valuation of all parcels covered in the individual docket numbers.

This is a final decision. The amounts of the individual abatements should be allocated to each docket number by the parties.

The board has made a finding of the value of the entire property and ordered an abatement as follows:

Year	*Assessed Valuation*	*Fair Cash Value*	*Equalized Tax Rate*	*Tax Assessed*	*Taxes Due*	*Abatement*
1981	$2,232,555	$5,314,000	$35.50	$210,977.40	$188,647.00	$22,330.40

APPELLATE TAX BOARD
BY (s) JOHN P. MULVIHILL, *Chairman*.
(s) PETER J. ALLEN, *Member*.
(s) ROBERT R. LEBLANC, *Member*.
(s) RICHARD T. EGAN, *Member*.
ATTEST: (s) RICHARD B. WILLIS, *Clerk*.

Date: May 31, 1983
(SEAL)

APPENDIX L

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

Docket Nos. 114551 - 114561, incl.

FOX RIDGE ASSOCIATES AND COMPANY

v.

BOARD OF ASSESSORS OF THE TOWN
OF MARSHFIELD

Promulgated: May 31, 1983

These are appeals under the formal procedure pursuant to G.L. c. 59, ss. 64 and 65, as amended, from the refusal of the appellee to abate taxes on certain real estate owned by the appellant for fiscal year 1981.

These findings of fact and report are made pursuant to G.L. c. 58A, s. 13, as amended, with the decision for the appellant, sua sponte by the board.

Walter L. Sullivan, Esq., for the appellant.
John F. Ridge, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Appellant was the owner of certain parcels of real estate located on Plain Street in Marshfield on January 1, 1980, the applicable assessment date. Taxes on all parcels except Docket No. 114560 were greater than $2,000.00.

On February 19, 1981 appellant filed a motion to extend time for payment of taxes, which motion was denied on March 31, 1981. Appellant filed a motion for reconsideration on April 8, 1981, which motion was allowed on May 8, 1981. Payment of the May 1st installment of tax was deferred as follows:

"1. Payment of so much of the May 1 installment as would be required to complete the payment of $167,721.74 (per the Board's decision for FY 1979 Dockets 103482-103492) is deferred to August 1.

2. Payment of the balance of the May 1 installment is deferred until 30 days after final decision in docket 114551."

Upon motion to further extend time for payment of taxes filed July 16, 1981, the board extended payment of the sum specified in Paragraph 1 of the board's order of May 8, 1981 to September 1, 1981. These orders of the board applied to all individual docket numbers in this case.

The following is a chart depicting information utilized by the board to determine jurisdiction:

Fiscal Year	*Application for Abatement Filed*	*Taxes Paid*	*Denial*	*Appeal Filed*
1981	10/15/80	10/15/80[1] (Second half various dates)[2]	None	2/19/81

Since all of the filings of the applications for abatement and appeals occurred on the same date, the findings are applicable to all individual docket numbers.

All the applications for abatement were filed within thirty days of the mailing of the tax bills.

Based upon all this information, namely the timely payment of taxes, or proper extension thereof, and the timely filing of applications for abatement and petitions to this board, jurisdiction is specifically found to hear all appeals.

The parcels include 20.44 acres of land, which is a composite of several irregular lots. It is improved with 23 wood, stucco and brick multifamily dwellings numbered 738-794 Plain Street. All of

[1] 678 Plain St., Paid 10/10/80; 682 Plain St., Paid 10/7/80

[2] 5/8/81, $9,397.07; 5/19/81, $7,026.33; 8/27/81, $46,000.00; all in accordance with Motions to Extend Time for Payment of Taxes. Total paid $176,874.48 by 9/1/81

the structures contain 12 living units each, with a mix of efficiency, one-bedroom and two-bedroom units. There are a total of 324 dwelling units ranging in size from 690 square feet to 900 square feet. There are also supporting facilities as follows: paved roads, parking areas, tennis courts, and a pool and cabana. The improvements were well maintained and the construction of fair quality. For a more detailed description of the property, see Exhibit 10, pages 11-19, which description, photos and layouts are adopted by the board as findings of fact.

At the hearing the appellant presented testimony from an expert witness who utilized the capitalization of income approach to value. The expert used the actual income and expense figures for calendar 1979, namely $917,141.00, including rent receipts plus additional income, and $435,676.00, respectively. The net income figure was $481,465 to which was applied a capitalization rate of .119 arriving at a fair market value of $4,045,924. The expert did not address the question of the potential gross income of the property or the application of a vacancy and uncollectible factor for the property. The appellant further failed to present a projection of expenses for the calendar year 1980.

The appellee presented testimony from an assistant assessor who also utilized the capitalization of income approach to value. Instead of using the actual income from the project, the assistant assessor took the rent rolls for the property as of 1/1/80, which had been submitted to the assessors by the appellant, averaged the rents, and deemed this average the economic rent for the property. This methodology derived a potential gross income for the property of $1,152,480. After deducting a vacancy and uncollectible factor of 5% (which is commonly regarded as standard for rental housing), adding additional income of $25,774, and deducting the actual expenses of $435,676, the assessor arrived at a net income of $684,877. The same capitalization rate used by appellant, .119, was applied to the net income and a fair market value of $5,755,268 was indicated for the property.

Both parties used a capitalization rate of .119 which erroneously contained the effective tax rate for FY 1980. They also used actual expenses for calendar 1979. The parties disagreed as to whether the starting point of developing an income stream to be capitalized should be the actual rents received for calendar 1979 or the average rent rolls as of 1/1/80. There was further disagreement on the use by the assessors of calendar 1979 expenses against the income stream developed by the use of the averaged rent rolls as of 1/1/80.

Unfortunately the appellant made no attempt to show what the actual expenses for calendar 1980 were, or what a reasonable projection of those expenses would be.

The board examined the actual rent received for calendar year 1979 ($891,367) and compared it to the sum of rent rolls for the project as of 1/1/80 as contained in Exhibit A. This information was not filled in on the information requisition form submitted to the assessors under G.L. c. 59, s. 38D (although the rent rolls presumably were attached thereto). The rent rolls showed a potential income of $94,683 per month or $1,136,196 annually. Since these were the actual potential rents as of 1/1/80 and were submitted by appellant, the board inferred that they would be in compliance with all appropriate HUD regulations. The board disregarded the averaged rentals utilized by the appellee.

The income shown by the rent rolls as of 1/1/80 was significantly higher than the actual rental income for calendar year 1979. This could mean that the rents on the property had been increased, or that an exceptional vacancy and uncollectible rate was experienced at the property, or that the property suffered from poor management in 1979. There was no testimony from appellant as to an exceptional vacancy or uncollectible rate on the property. There was no testimony as to increased rentals, but there was some testimony as to poor management at the property in 1978 prior to new management being hired.

The board, however, does not have to resolve the disparity between the rent rolls and actual income. "Regardless of what procedures are used to develop the economic income projection, the objective is a reasonable estimate of the rent that the property would command, *for the foreseeable future*, if the space were currently available for rent in the open market." (emphasis supplied). *The Appraisal of Real Estate* (7th ed.), American Institute of Real Estate Appraisers, Chicago, Ill., P. 328 (1978). The burden of proof is on the appellant. The board is satisfied, on the state of the evidence submitted, that the use of the actual rents received for calendar year 1979 would not fairly represent the potential gross income of the property.

It should be realized that "Past and present incomes, either gross or net, are significant only as indications of prospective future income. To conclude otherwise would be as illogical as to value the stock of a business concern on the basis of its past earnings paying a dividend of $1.50 per share for 10 years, when the concern is now approaching bankruptcy." *The Appraisal of Real Estate*, supra, P. 325.

The board specifically finds that the rent rolls of the subject property as of 1/1/80 are the best indication of gross potential income in this particular case. In conformity with this decision, the board looked to the actual rents collected for 1980 as contained in Exhibit 9 and determined that the actual vacancy for the property was 11.7%. This figure was weighed against the assessor's testimony of 5% and the testimony of poor management prior to 1978. After considering each of these factors, the board selected 10% as the appropriate vacancy for the property. The board used the 1980 additional income figure of $13,242.00 as contained in the audit (Ex. 9).

Finally, the board extracted expense figures for calendar 1980 from the audit (Ex. 9). In doing so the board first looked to the 1979 expenses contained in the appraisal report (Ex. 10A) and compared them to the 1979 expenses contained in the

audit (Ex. 9). The board was unable to correlate these figures. Left to its own devices, the board then utilized Ex. 9 and totaled the 1980 expenses as follows:

Renting	$ 7,824
Administration	99,720
Operating	138,115
Maintenance	152,811
	$398,470

The board added the 1979 insurance cost of $23,592 and totaled expenses at $422,062.

Both parties included in their expenses an allowance of $40,450 as a reserve for replacement of short-term items such as appliances. The board determined such an allowance was inappropriate in this case and therefore did not include the allowance in the expenses.

There are several reasons why the board determined the reserve improper. On January 1, 1980 the project was approximately nine years old. It was within one year of the scheduled replacement of the carpeting and hot water heaters for the first time and the dishwashers for the second time (according to the life spans contained in the appraisal report). The audit disclosed no such reserves for these upcoming expenses. This led the board to conclude that the replacement of these items would be carried in the operating and maintenance accounts listed in the audit. Thus adding these expenses in a second time as scheduled expenses would improperly inflate the audit expenses.

Further, the capitalization rate used by the parties was adopted from a prior decision of the board. In that decision the board held that the reserve for replacement of short-term items was included in the depreciation factor used in the capitalization rate. Further, if such a reserve were established, it would undoubtedly earn income, and the appraiser should include an adjustment for such earned income until the scheduled replacement occurs. Finally the board determined

that such reserves were not appropriate for the electrical, plumbing and roof expenses in this multi-unit residential housing because such items are included in the depreciation factor used in the capitalization rate.

The board calculated the fair market value of the property as follows:

$1,136,196.00	Potential gross income
113,620.00	10% vacancy
1,022,576	
13,242	1980 additional income
1,035,818	
422,062	Less expenses
613,756	
+ .1155	
$5,313,904.70	Call $5,314,000

The board utilized the capitalization rate agreed upon by the parties with an appropriate adjustment for the fiscal year 1981 tax factor. The capitalization rate included, in addition to the tax factor, a rate of return and depreciation.

The board utilized the equalization studies of the Department of Revenue in arriving at an effective tax rate of $35.50 for fiscal year 1981 in accordance with such studies.

Based on all the evidence, testimony, exhibits and examination and analysis of the appraisal reports and the foregoing general and subsidiary findings, the board found the fair cash value for fiscal year 1981 to be $5,314,000.

OPINION

Two issues are raised by these appeals: overvaluation and disproportionate assessment.

As to overvaluation, the standard to be used in determining "fair cash value" is well known and without dispute. It is the price at which a willing seller, not under compulsion to sell, will sell and a willing buyer, not under compulsion to buy, will buy the property in question, each party having full knowledge of all relevant facts. *Boston Gas Company* v. *Assessors of Boston*, 334 Mass. 549 (1950).

The decision of the board, although required to be based upon evidence presented, need not coincide with the valuation given by any witness. The market value of any real estate cannot be determined with mathematical certainty, but must ultimately rest in the realm of opinion, estimate and judgment. *Assessors of Quincy* v. *Boston Consolidated Gas Company*, 309 Mass. 60 (1941).

The board used an effective tax factor in its capitalization rate in arriving at the fair market value of the subject property. The purpose of a tax factor in a formula for capitalizing earnings is to reflect the tax which will be payable on the assessed valuation produced by the formula. See *Assessors of Lynn* v. *Shop Lease Company, Inc.*, 364 Mass. 569, 573 (1974).

The capitalization of income approach to value is one of the accepted approaches to valuation and can be utilized by the board. *Correia* v. *New Bedford Redevelopment Authority*, 375 Mass. 360, 362 (1978).

As to disproportionate assessment for fiscal year 1981, a taxpayer is entitled to be taxed at an amount which approximates the amount he would have been taxed had the municipality been assessing all property at full value. This new tax is arrived at by applying an "equalized tax rate" to the fair cash value of the property for which an abatement is sought. The taxpayer is entitled to an abatement of any excess of the actual tax bill over the newly computed tax bill. The "equalized tax rate" is computed by dividing the total taxes assessed for a municipality by the fair cash value of all taxable property of that municipality. The equalization valuation figures prepared by the Commissioner of Revenue may be used for this purpose. See G.L. c. 58A, s. 14, inserted by St. 1979, c. 797, s. 10; *Kenniston* v. *Assessors of Boston*, 1980 Adv. Sh. 1485, 1488.

These principles were applied by the board in determining the fair cash value for the appellant's real estate in these appeals.

Appellant filed 10 Requests for rulings of law. Requests Numbered 2, 3, 4 and 10 are granted; Requests Numbered 1, 6, 7, 8 and 9 are denied. Request No. 5 is denied because the actual rents received in this case do not represent the fair economic rent for the subject property.

Our decision is promulgated May 31, 1983.

APPELLATE TAX BOARD
By (s) JOHN P. MULVIHILL, *Chairman*.

A True Copy

Attest: (s) RICHARD B. WILLIS, *Clerk*.